IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 22, 2005 Session

STATE OF TENNESSEE v. SABRINA RENEE LEWIS

Appeal from the Criminal Court for Davidson County
No. 2002-B-713 Cheryl Blackburn, Judge

No. M2004-02255-CCA-R3-CD - Filed March 15, 2006

The appellant, Sabrina Renee Lewis, was indicted with a co-defendant on one count of first degree felony murder and one count of especially aggravated robbery. After a trial, the jury found the appellant guilty of criminally negligent homicide and facilitation of attempted especially aggravated robbery. As a result, the appellant was sentenced to six years as a Range III persistent offender for criminally negligent homicide and fifteen years as a Range III persistent offender for facilitation of attempted especially aggravated robbery. The trial court ordered the sentences to be served consecutively, for an effective sentence of twenty-one years. After the denial of a motion for new trial, the appellant seeks resolution of the following issues on appeal: (1) whether the trial court properly admitted the appellant's video-taped statement into evidence; (2) whether the prosecutor's reference to an alibi during closing arguments was prejudicial in light of the trial court's curative instruction; (3) whether the trial court properly admitted the victim's dying declaration into evidence; (4) whether the trial court properly allowed an expert to testify about DNA testing; and (5) whether the trial court properly sentenced the appellant. For the following reasons, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES and DAVID G. HAYES, JJ., joined.

Jay Norman, Nashville, Tennessee, for the appellant, Sabrina Renee Lewis.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Pamela Anderson and Roger Moore, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

In July of 2001, the victim, Gary Dean Finchum, and his wife, Linda Finchum, owned an antique business named "Always Antiques," in Madison, Tennessee. On July 13, 2001, the victim was shot multiple times while working at his store. He died the following day as a result of multiple gunshot wounds.

In April of 2002, the Davidson County Grand Jury returned a multi-count indictment against the appellant and a co-defendant, James Edward Taylor, charging them with one count of first degree felony murder and one count of especially aggravated robbery.

At trial, the victim's wife, Linda Finchum, testified that the appellant came into the store about three weeks prior to her husband's death. The appellant wanted Mrs. Finchum to examine one vase from a pair of vases that she was interested in selling to the Finchums. Mrs. Finchum explained that as part of their business, they often bought individual items from people to resell in the store. Mrs. Finchum explained to the appellant that her husband did the buying and pricing and instructed the appellant to return to the store later to talk to him. About one week prior to her husband's death, the appellant again came into the store and walked around. The appellant claimed to be looking for a gift for her mother who lived in New York. Mrs. Finchum and her husband offered to come to the appellant's home to examine the vases, but the appellant stated that she would return to the store with the vases later that evening.

Prior to her arrest, the appellant gave a videotaped statement to the police. In that statement, the appellant admitted that she was in Always Antiques on July 13, 2001. The appellant explained that she spoke with the victim, negotiated a price for the vases, and gave the victim her contact information. The appellant claimed that after she was given $125 for the two vases she left the store. The appellant explained that after she left the store, she dropped off the car she was borrowing at Vanderbilt, then went to her mother's house for a few hours before returning home.

Pugh's Pharmacy was located next door to Always Antiques. On the day of the incident, Brenda Farmer and Judy Summers were working at the pharmacy. At approximately 11:00 a.m., the two women heard several loud crashes coming from the direction of Always Antiques. Ms. Summers noticed an older, "possibly gray" vehicle parked outside the back door with the motor running. Ms. Summers thought that she saw someone sitting in the front passenger's side of the vehicle. After a few minutes, Ms. Summers and Ms. Farmer walked next door to Always Antiques to investigate the noises. As they entered the store, they heard the victim call out for help. The victim told them to "call 911" because he had been "shot in the heart." Ms. Summers also noticed a bullet hole in the victim's arm. Ms. Farmer ran back to the pharmacy, informing them of the situation and instructing someone to call 911. The victim told Ms. Summers that a "black man" shot him and that "they" tried to rob him, but were unsuccessful.

Detective Mike Chastain was approximately two blocks north of the antique store on his way to lunch when he heard the radio report of the shooting and attempted robbery. Detective Chastain arrived on the scene prior to the paramedics and found the victim laying in the floor at the rear of the store. The victim was able to identify himself. When asked if he was robbed, the victim responded, "he tried to." The victim identified the shooter as a "male black" who was "young." Shortly after the paramedics arrived, the victim pointed with both of his hands and said: "Officer, officer, the lady's information is on the desk." Detective Chastain asked the victim what "lady" he was talking about and the victim responded, "the lady with the vases." When the detective asked the victim whether "this lady" was somehow connected to the shooting and robbery, the victim stated, "I know she is." Another detective located a piece of paper on the counter with the name "Sabrina Lewis," what appeared to be a driver's license number and the words "two vases" on it.

While talking with the victim, Detective Chastain noticed a hat lying on the floor of the store. The victim identified the hat as belonging to the shooter. Detective Chastain and a paramedic moved an oval table over the hat while making room in the store for the gurney.

After recovering the piece of paper from the counter in the store, Detective Norris Tarkington gathered information about "Sabrina Lewis" from the computer. Later that day, Detective Tarkington, along with several other officers, went to the appellant's residence at 2616 Jones Avenue. The officers knocked on the door and the appellant opened the door several minutes later. The appellant agreed to voluntarily come down to the police station to talk with the authorities. Her statement was videotaped.

Mary Fisher testified that on July 13, 2001, she was driving her vehicle to the Fin Den, a pet store located across the street from Always Antiques. Ms. Fisher remembered stopping at the red light on Gallatin Road directly across from the antique store. As the light turned green, Ms. Fisher saw a man running out of the store with something black in his hand. She described the man as an African-American man slightly over six feet tall, wearing a red shirt, jeans and tennis shoes. Ms. Fisher also noticed a woman driving a vehicle at the corner of a side street that flanked the antique store. The woman made a left turn despite a red light, almost running into Ms. Fisher's vehicle. The woman driving the car was talking, but Ms. Fisher did not see the face of any other passenger in the car. Ms. Fisher informed a uniformed officer at the scene about what she saw.

In January of 2002, Ms. Fisher was contacted by a Metro detective about what she saw on July 13, 2001. The detective visited Ms. Fisher at the Corrections Corporation of America facility in Nashville, where she was incarcerated for DUI. Ms. Fisher was shown a photo array of women and identified the appellant as someone who looked familiar. About one month later, Ms. Fisher identified the appellant as the woman driving the vehicle. At trial, Ms. Fisher identified the appellant as the driver of the vehicle.

Terry Battle, an inmate in the Tennessee Department of Correction, testified that the appellant visited him in jail during the summer and early fall of 2001. During these visits, the appellant told Mr. Battle that she was under investigation for a killing in Madison. According to Mr.

Battle, the appellant stated that she sold some vases to a man at an antiques store, then went to her mother's home. At her mother's house, the appellant told a cousin named "Black" that the man at the store had a large sum of money. After this conversation, the appellant drove a vehicle with her mother and "Black" as passengers to the antiques store. "Black" went into the store while the two women waited in the vehicle. After the appellant heard a shot, "Black" ran out of the store and jumped into the vehicle. The appellant drove "Black" to the housing project, where he got out of the car.

Several hairs were found in the hat that was recovered from the crime scene. Dr. Terry Melton, an expert in mitochondrial DNA analysis, testified at trial that her lab received a hair sample from the Metropolitan Nashville Police Department along with blood samples from the appellant's two sons. After an analysis was conducted on the items by an employee of the lab, Dr. Melton analyzed the results. She concluded that the appellant's two children and their maternal relatives could not be excluded as donors of the hair in the hat and that 99.94% of the population in North America would not have this type of DNA given the available database.

At the conclusion of the jury trial, the jury returned a verdict of guilty on the lesser-included offenses of criminally negligent homicide and facilitation of attempted especially aggravated robbery. After a sentencing hearing, the trial court sentenced the appellant to six years as a Range III persistent offender for criminally negligent homicide and fifteen years as a Range III persistent offender for facilitation of attempted especially aggravated robbery. The trial court ordered the sentences to be served consecutively, for an effective sentence of twenty-one years.

The appellant filed a motion for new trial, challenging several aspects of her conviction. The motion was denied by the trial court. Subsequently, the appellant filed a timely notice of appeal. On appeal, the appellant challenges the admission of the video-taped statement, the prosecutor's reference to an alibi during closing argument, the admission of the victim's dying declaration, the admission of the expert testimony of Dr. Melton and her sentence as excessive.

Admission of the Video-taped Statement

The appellant argues on appeal that the trial court improperly allowed her statement to be admitted into evidence. Specifically, the appellant argues that Rule 803(1.2)(A) of the Tennessee Rules of Evidence providing a hearsay exception for an admission by a party opponent, did not permit the trial court to admit her statement into evidence because "the content of the statement was not in fact against her interest."

In the case herein, the police went to the appellant's residence, knocked on the door, and invited her to come give a statement regarding the incident at the antique store. The appellant voluntarily gave the statement and was free to leave at any time. During the statement, the appellant denied any involvement in the attempted robbery or murder, but admitted that she had been in the store on the morning of the murder to sell vases to the victim.

In Helton v. State, 547 S.W.2d 564 (Tenn. 1977), the Tennessee Supreme Court set forth a definition for admissions against interest. The Supreme Court stated:

> The distinction between an admission and a confession is blurred. Generally, however, "a 'confession' is a statement by the accused that he engaged in conduct which constitutes a crime . . . ." An admission is an acknowledgment by the accused of certain facts which tend together with other facts, to establish his guilt; while a confession is an acknowledgment of guilt itself. An admission, then, is something less than a confession and, unlike a confession, . . . an admission is not sufficient in itself to support a conviction.

Id. at 567 (quoting 3 Wharton's Criminal Evidence (13 ed. Torcia 1973), §§ 662 and 663); see also State v. Kyger, 787 S.W.2d 13, 23 n.2 (Tenn. Crim. App. 1989). While the statements made by the appellant during the interview herein are certainly not a confession, we agree with the trial court that the statements should be construed as an admission against interest.[1] See generally State v. Antonio George White, No. 775, 1987 WL 25166, at *1 (Tenn. Crim. App., at Knoxville, Dec. 1, 1987) (stating that defendant's statement denying involvement in the crime, but admitting being at the crime scene with another perpetrator was an admission under Helton); see also State v. Litton,161 S.W.3d 447, 457 (Tenn. Crim. App. 2004).

During the interview herein, the appellant admitted that she was in the antique store at around 9:30 a.m. on the day of the murder, that the victim paid her $125 in cash for the two vases and that, after leaving the store, she returned the car she borrowed to Vanderbilt and went to her mother's house. Although she specifically denied any involvement with or participation in the attempted robbery or murder, she responded positively to questions, which, when considered along with the victim's dying declaration and the identification of the appellant as the driver of the getaway car, tend to establish the her guilt. The trial court properly admitted the appellant's video-taped statement as an admission against interest under Tennessee Rule of Evidence 803(1.2)(A). This issue is without merit.[2]

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[1] We note that in order to be considered an admission against interest under the Helton standard, the statement must only contain an "acknowledgment by the accused of certain facts which tend together with other facts, to establish [her] guilt." 547 S.W.2d at 567. There is no requirement, as the appellant suggests, such as there is for the "statement against interest" exception to the hearsay rule, that the statement must be against the declarant's pecuniary or propriety interest or must tend to subject the declarant to civil or criminal liability at the time the statement is made. SeeTenn. R. Evid. 804(b)(3).

[2] The appellant also appears to argue that the introduction of her video-taped statement violated her right not to testify. The appellant cites no authority for this argument. Therefore, this argument is waived. See Tenn. Ct. Crim. App. R. 10(b).

Admission of the Victim's Dying Declaration

The appellant contends that the trial court erred in admitting into evidence as a dying declaration the victim's response "I know she is" to Detective Chastain's question whether "the lady with the vases" was somehow connected to the shooting and robbery. Specifically, the appellant argues that the victim's statement was a speculative opinion and that her identity was not confined to the immediate circumstances of the murder and does not identify the shooter. The State claims that the victim's statement was properly admitted as a hearsay exception as it was a dying declaration.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Tenn. R. Evid. 801. Hearsay statements, in general, are inadmissible. Notwithstanding, the reliability and circumstantial guarantees of trustworthiness of certain nontestimonial statements have permitted courts to carve out various limited exceptions to the hearsay rule. One such hearsay exception is the dying declaration.

This hearsay exception is essentially a codification of the common law, and common law decisions are, therefore, pertinent to its interpretation. The rationale for this hearsay exception is that one facing imminent death will be truthful for fear of "eternal consequences." Neil P. Cohen, et al., Tennessee Law of Evidence, § 804(b)(2.1) at 599 (3d ed.1995). The awareness of impending death is deemed equivalent to the sanction of an oath. See Anthony v. State, 19 Tenn. 265, 278 (1838) (cited in Beard v. State, 485 S.W.2d 882, 885 (Tenn. Crim. App. 1972)); State v. Lunsford, 603 S.W.2d 745, 746-47 (Tenn. Crim. App. 1980). In Smith v. State, 28 Tenn. 9, 19 (1848) (citation omitted), our supreme court observed that when the declarant "'is at the point of death, and when every hope of this world is gone, when every motive of falsehood is silenced, and the mind is induced by the most powerful consideration to speak the truth, a situation, so solemn and awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice.'"

Tennessee Rule of Evidence 804(b)(2) enumerates the circumstances that allow for the introduction of statements made "under belief of impending death," otherwise known as dying declarations. "In a prosecution for homicide, a statement made by the victim while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death" is admissible despite being ordinarily considered hearsay. Tenn. R. Evid. 804(b)(2). In other words, a dying declaration has five elements: (1) the declarant must be dead at the time of the trial; (2) the statement is admissible only in the prosecution of a criminal homicide; (3) the declarant must be the victim of the homicide; (4) the statement must concern the cause or the circumstances of the death; and (5) the declarant must have made the statement under the belief that death was imminent. State v. Hampton, 24 S.W.3d 823, 828-29 (Tenn. Crim. App. 2000). The last requirement provides the indicia of reliability and truth that justifies admission of the statement. See Neil P. Cohen, et al., Tennessee Law of Evidence, § 8.35(2) (4th ed. 2000). The burden is on the proponent of the hearsay statement to justify its admission as an exception to the hearsay rule of exclusion by proving the existence of the preliminary facts by a preponderance of the

evidence. See State v. Stamper, 863 S.W.2d 404, 405 (Tenn. 1993). If the trial court finds that it is more probable than not that the preliminary facts exist, the evidence is admissible.

In the case herein, the appellant filed a motion in limine attempting to exclude any and all statements made by the victim. The trial court held a jury-out hearing during the trial to determine whether to grant or deny the appellant's motion. In denying the motion, the trial court ruled that the statement was admissible under the dying declaration exception in Tennessee Evidence Rule 804(b)(2). As a basis for its ruling, the trial court cited State v. Edwin Gomez, No. M2002-01209-CCA-R3-CD, 2004 WL 305787 (Tenn. Crim. App., at Nashville, Feb. 18, 2004), aff'd on other grounds by State v. Gomez, 163 S.W.3d 632 (Tenn. 2005), and stated that it had:

> [L]istened to the circumstances, and when I couple everything and most particularly Ms. Summers' statement which talked about not only his description, the pain, but her last testimony that as they were waiting on the ambulance and the police, his breathing got slower. She was afraid he was going to die before the ambulance got there. His voice was weaker. His breathing was shallow, more shallow, so based on everything that occurred before, her observations, Ms. Farmer's observations, and then Detective Chastain's observation, I'm going to allow the statement.

After the trial court overruled the motion, the following exchange took place during Detective Chastain's testimony:

> COUNSEL FOR STATE: [C]ould you describe for the ladies and gentlemen of the jury what you noticed and where [the victim] was?
>
> WITNESS: He had a blood covered arm. His shirt was covered with blood. Also, the carpet surrounding him was soaked. He was having trouble talking and the first thing I think I asked him was his name. He stated just his last name, ... I think stated, I asked him if he was robbed. He stated, he tried to. I asked him what the person looked like. He said it was a male black. I asked him if he was, how old he was. He stated, young. I then asked him, are you talking about teens, and he stated, no, older than that. He pointed out a blue floppy hat that was just past his head.
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> COUNSEL FOR STATE: He actually pointed that out to you?
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> WITNESS: Yes, he said, that is his hat. And he couldn't look in that direction, but he was pointing in that direction. And there was a blue, kind of two-toned blue floppy, like Gilligan's type, the kind you could wad up, laying just past him. He then stated he had been shot three times. I could see two wounds to his, I believe it was his right arm that he had over his chest. Like I said, his shirt was blood soaked, so I felt he had another injury somewhere, just due to his breathing and the way he was acting.
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> COUNSEL FOR STATE: When you say the way he was acting and his breathing, what do you mean by that?

> WITNESS: Well, you could tell he was in obvious pain. He was, I think he might have even said, you know, it hurts. He appeared to be having trouble . . . .
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> And at one point, when the paramedics got there and started treating him, I don't know if he already had the oxygen mask on, but he pulled the mask away and said, officer, officer, and he pointed . . . with both hands towards us, . . . he turned around and said officer, officer, the lady's information is on the desk. And it kind of took me, you know, I kind of had to step back as he was describing a male black, you know, the whole time, and when he said the lady's information is on the desk, I had to ask him, I said, well, what lady are you talking about? He said, the lady with the vases. So then I had to ask him, well, are you saying that, you know, this lady is somehow connected to this shooting and robbery? And he stated, I know she is. At that point, the paramedics had about got him ready for transport, and were carrying him out.

Our standard of review for a trial court's findings of fact and conclusions of law on a motion to suppress evidence is set forth in State v. Odom, 928 S.W.2d 18 (Tenn. 1996). Under this standard, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." Id. at 23. Questions of witness credibility, the weight and value of evidence, and resolution of conflicts in the evidence are entrusted to the trial court as the trier of fact. Id. As is customary, "the prevailing party in the trial court is afforded the 'strongest legitimate view of the evidence and all reasonable and legitimate inferences that may be drawn from that evidence.'" State v. Carter, 16 S.W.3d 762, 765 (Tenn. 2000) (quoting State v. Keith, 978 S.W.2d 861, 864 (Tenn. 1998)). Nevertheless, this Court reviews de novo the trial court's application of the law to the facts, without according any presumption of correctness to those conclusions. See State v. Walton, 41 S.W.3d 775, 81 (Tenn. 2001); State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999).

This Court has previously held that it is not necessary that the declarant state unequivocally a belief that death is imminent. State v. Edwin Gomez, 2004 WL 305787, at *14-15; State v. Maruja Paquita Coleman, No. 01C01-9401-CR-00029, 1997 WL 438169, at *5 (Tenn. Crim. App., at Nashville, July 31, 1997); see also State v. Robert Earl Johnson, No. M2000-01647-CCA-R3-CD, 2001 WL 1180524, at *10 (Tenn. Crim. App., at Nashville, Oct. 8, 2001), perm. app. denied, (Tenn. Apr. 1, 2002); State v. Y'vette Vitina Vaden, No. 01C019708-CC-00366, 1998 WL 401718, at *1 (Tenn. Crim. App., at Nashville, Jul. 20, 1998). "Awareness of impending death has been inferred from the language and condition of the declarant, the facts and circumstances surrounding the statement, and medical testimony concerning the seriousness of the victim's condition." State v. Maruja Paquita Coleman, 1997 WL 438169, at *5 (citations omitted). In other words, the law requires only that the declarant believed death was "imminent;" proof that the dying declarant believed that death would come within a specified number of hours or minutes is not reasonable. Importantly, it is not necessary that the victim die shortly after making the statement to qualify for the hearsay exception as a dying declaration if the requirements of the rule are satisfied. Id.

We agree with the State that the statement made by the victim seems to satisfy the requirements for a dying declaration at first glance. The victim died as a result of his gunshot wounds, the statement was admitted at the prosecution of a homicide, the statement concerned the cause or circumstances of the death, and the victim made the statement under the belief that death was imminent. However, the State fails to acknowledge the appellant's argument that "the victim's opinion that the lady with the vases is somehow involved in the crime, without a showing of factual basis for the opinion, is speculative at best and would lead the jury to suspect that the appellant was involved in the crime without a factual basis for their belief."

Indeed, the majority of jurisdictions subscribe to the belief that since a dying declaration is a substitute for sworn testimony, it must appear that the declaration would have been admissible had the declarant been testifying as a witness. Because opinion evidence by a lay witness is not generally admissible, the declarant's expression of an opinion or a conclusion is not generally admissible in evidence as a dying declaration. 2 Wharton's Criminal Evidence, § 6:30 (15th ed.1998). See e.g., Kissic v. State, 94 So. 2d 202 (Ala. 1957); Thurman v. State, 204 S.W.2d 155 (Ark. 1947); Malone v. State, 72 So. 415 (Fla. 1916); Hawkins v. State, 101 S.E.2d 710 (Ga. 1958); Broughton v. Commonwealth, 202 S.W.2d 1014 (Ky. 1947); People v. Alexander, 126 N.W.837 (Mich. 1910); Powell v. State, 118 So. 2d 304 (Miss. 1960); State v. Proctor, 269 S.W.2d 624 (Mo. 1954); Commonwealth v. Knable, 85 A.2d 114 (Pa. 1952); Baxter v. State, 83 Tenn. 657 (1885); Walthall v. State, 165 S.W.2d 184 (Tex. 1942); State v. Long, 1 P.2d 844 (Wash. 1931); State v. Germana, 280 N.W. 375 (Wisc. 1938).

In Baxter v. State, 83 Tenn. 657 (1885), the Tennessee Supreme Court examined the admissibility of the statement of an elderly woman as to the identity of her assailant. In Baxter, the victim lived for sixteen days after she was attacked. During that period of time, the victim was able to identify the defendant as her assailant. In order to determine the admissibility of the victim's statements as dying declarations, the trial court separately examined six witnesses out of the presence of the jury. In the end, the trial court determined that the statements made by the victim identifying the defendant as the perpetrator were admissible. On appeal, the defendant complained that the trial court admitted some of the statements in error. The Tennessee Supreme Court determined that the trial court properly admitted the statements. In so doing, they noted that "[dying] declarations . . . must speak, in general, to facts only, and not to mere matters of opinion, and must be relevant to the issue. Id. at 661.

In the case herein, in the statement made by the victim to the officer, the victim did not identify the appellant as the person who robbed and shot him. He stated that he "knew" that "the lady with the vases" was somehow involved in the robbery. The victim's statements were mere opinion as to the perpetrator. Thus, the trial court improperly admitted the opinion statement as a dying declaration.

Having concluded that the trial court erroneously admitted the evidence, the question becomes whether the error can be classified as harmless. In assessing the effect of an error, this Court must determine whether, in the context of the entire record of the evidence, the error affected the

verdict to an extent which would leave us unable to say that it did not influence the verdict. Tennessee Rule of Appellate Procedure 36(b) provides that a verdict "shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tennessee Rule of Criminal Procedure 52(a) provides that a conviction may be set aside only "for errors which affirmatively appear to have affected the result of the trial on the merits."

Here, the hearsay statement by the victim was not the only direct evidence of guilt. While there were no eyewitness accounts of the incident and no murder weapon was located, the appellant admitted to police that she was in the store on the day of the incident. Mary Fisher was able to identify the appellant as the person driving the getaway car seen leaving the area on the day of the incident. Further, Terry Battle testified that the appellant told him that she drove her mother and cousin "Black" to the store on the day of the incident and that she and her mother waited in the car while "Black" entered the store. The appellant also told Mr. Battle that they left the area after hearing a "shot" when "Black" ran from the store and jumped into the vehicle. Moreover, the DNA recovered from the crime scene did not exclude the appellant's two children or their maternal relatives as the donors of the DNA. Lastly, the appellant was charged with first degree murder and especially aggravated robbery and convicted of the lesser-included offenses of criminally negligent homicide and facilitation of attempted especially aggravated robbery. Thus, in our view, the trial court's erroneous admission of the dying declaration did not affect the verdict. Accordingly, the error was harmless.

Expert Testimony

The appellant next complains that the trial court erroneously permitted Dr. Terry Melton to testify about the results of DNA testing on the hair samples found in the hat that was recovered from the crime scene. Specifically, the appellant contends she was denied the right to confront Dr. Kimberly Nelson, the person who actually performed the DNA testing. The State argues that the appellant waived any objection to Dr. Melton's testimony by failing to file a pretrial motion under Tennessee Rule of Criminal Procedure 12 and, in the alternative, that the trial court properly admitted the testimony over the appellant's objection.

Prior to Dr. Melton's testimony, the appellant objected to any testimony by Dr. Melton as to the results of the DNA testing on the basis that she did not actually perform the testing and, therefore, the appellant would be denied the right to confront the witness. The objection, however, was confusing. Counsel interchanged the phrase "chain of custody" with the phrase "right of confrontation," to which the trial court responded:

> Well, I'll hear from the State, but if your argument is that it's a chain of custody argument, that they haven't brought in everybody that touched it [the DNA sample], then that is one argument. If it is another about confrontation, if there is a missing witness here, then that is a different argument, but what is it you're asking this Court to do?

Counsel for the appellant stated that the objection was grounded on the right to confrontation of the person who "actually manipulated the sample." The trial court overruled the objection, stating that she was unaware of what Dr. Melton had done because she had not yet testified.

During Dr. Melton's cross-examination, she testified that she did not actually conduct the laboratory work on the DNA sample, but that she analyzed the data on the samples once the testing was completed. She explained:

> Well, in our laboratory, we use the model of the FBI, which is that we have technicians who do the bench work and those technicians are not testifying personnel. They do the laboratory work.
>
> Dr. Nelson and I do all the data analysis and supervise the work of the technicians, so that is our standard procedure.
>
> . . . .
>
> She [Dr. Nelson] performed exactly as a technician would in this case. Sometimes when we get very busy, she will do some laboratory work and she's qualified to do that, but typically, she does not do laboratory work. She and I analyze the data, write the reports, and testify.

The appellant cites State v. Henderson, 554 S.W.2d 117 (Tenn. 1977), to bolster her argument that allowing Dr. Melton to testify regarding the results of the test performed by Dr. Nelson denied her the right to confront the witness.

The Constitution of the United States provides the accused in a criminal prosecution the right "to be confronted with witnesses." U.S. Const. amend. VI. The Tennessee Constitution provides the right "to meet witnesses face to face." Tenn. Const. art. I, § 9.

These guaranties were created in order to: (1) have the witness testify under oath and subject to the penalties for perjury; (2) enable the fact-finder to observe the manner or demeanor of the witness and assess his or her credibility; and (3) have the witness available for cross-examination. See Ohio v. Roberts, 448 U.S. 56, 63-64 (1980) (internal quotation omitted); California v. Green, 399 U.S. 149, 158 (1970); State v. Hughes, 713 S.W.2d 58 (Tenn. 1986). Notwithstanding these objectives, the right of confrontation is not absolute and must occasionally give way to considerations of public policy and necessities of the case. State v. Kennedy, 7 S.W.3d 58, 65 (Tenn. Crim. App. 1999) (citing Jenkins v. State, 627 N.E.2d 789, 793 (Ind. 1993)). Thus, the United States Supreme Court has repeatedly refused to apply a literal interpretation of the Confrontation Clause which would bar the use of any hearsay. Idaho v. Wright, 497 U.S. 805, 814 (1990); see also Sherman v. Scott, 62 F.3d 136, 140 (5th Cir. 1995), cert. denied, 516 U.S. 1180 (1996).

The Tennessee Supreme Court has addressed the standards and criteria that must be met in order for out-of-court statements to satisfy the Confrontation Clause of both the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Tennessee Constitution. See State v. Armes, 607 S.W.2d 234, 236 (Tenn. 1980); State v. Henderson, 554 S.W.2d 117 (Tenn. 1977). In Henderson, our supreme court recognized that valid claims of an unconstitutional abridgement of the right to confront witnesses arise when:

> (1) [T]he hearsay evidence is crucial to proving the State's case, i.e., the evidence is offered to prove an essential element of the crime or it connects the defendant directly to the commission of the crime;
> (2) there is no proof that the witness is unavailable, i.e., the State must make a good faith effort to secure the presence of the person whose statement is to be offered against the defendant; and
> (3) the hearsay evidence is lacking its own indicia of reliability.

Henderson, 554 S.W.2d at 120.

Notwithstanding the constraints imposed by the test announced in Henderson, the United States Supreme Court has held that a demonstration of availability, part (2) of the Henderson test, is not always required. Roberts, 448 U.S. at 65, n.7; Sherman, 62 F.3d at 140. Moreover, our supreme court has also recognized that "firmly rooted exceptions to the hearsay rule do not violate the Confrontation Clause." See State v. Causby, 706 S.W.2d 628, 631 (Tenn. 1986); see also State v. Harvey Phillip Hester, No. 03C01-9704-CR-00144, 1998 WL 288711 (Tenn. Crim. App., at Knoxville, June 4, 1998) (citing State v. Alley, 968 S.W.2d 314, (Tenn. Crim. App., at Jackson 1997), perm. app. denied, (Tenn. 1998); State v. Kenneth Antonio Lillard, No. 01C01-9602-CC-00051, 1997 WL 67906 (Tenn. Crim. App., at Nashville, Feb. 12, 1997)). The rationale for this principle is based upon the premise that some forms of admissible hearsay rest upon such solid foundations that admission of virtually any evidence within them comports with the right of confrontation. See Roberts, 448 U.S. at 66; Causby, 706 S.W.2d at 631 (holding that former testimony hearsay exception is such a firmly established rule and so inherently reliable that any such evidence necessarily comports with right of confrontation.).

> Indeed, statements admitted under a firmly rooted hearsay exception are so inherently trustworthy that adversarial testing would add little to their reliability. In other words, a hearsay exception will satisfy the Confrontation Clause if the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.

Kennedy, 7 S.W.3d at 66.

However, in Crawford v. Washington, 541 U.S. 36 (2004), the United States Supreme Court overruled Roberts with respect to "testimonial" hearsay, because of the tendency under the Roberts test "to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." Id. at 63. The Court announced a new test to determine the admissibility under the Confrontation Clause of hearsay offered against an accused. Testimonial statements may not be offered into evidence unless two requirements are satisfied: (1) the declarant/witness must be unavailable and (2) the defendant must have had a prior opportunity to cross-examine the declarant/witness. Id. at 68. "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." Id. at 68- 69.

In State v. Larry Maclin,No. W2003-03123-SC-R11-CD, ___ S.W.3d ___, 2006 WL 120341 (Tenn. Jan. 18, 2006). The Tennessee Supreme Court recently had the opportunity to examine the admissibility of both testimonial and nontestimonial statements post-Crawford. In Larry Maclin, the court determined:

> When the prosecution seeks to introduce a declarant's out-of-court statement, and a defendant raises a Confrontation Clause objection, the initial determination under Crawford is whether the statement is testimonial or nontestimonial. Crawford, 541 U.S. at 68. If the statement is testimonial, then the trial court must determine whether the declarant is available or unavailable to testify. If the declarant is available, then there is no confrontation problem: "[t]he Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Id. at 59 n.9 (citing California v. Green, 399 U.S. 149, 162, 90 S.Ct. 1930, 26 L. Ed. 2d 489 (1970)). If the declarant is unavailable, the trial court must determine whether the accused had a prior opportunity to cross-examine the declarant about the substance of this statement. Id. at 68. If the accused had such an opportunity, the statement may be admissible if it is not otherwise excludable hearsay. If the accused did not have this opportunity, then the statement must be excluded.
>
> If the statement is nontestimonial, the Confrontation Clause analysis does not end. Instead, consistent with Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L. Ed. 2d 597, the court must determine whether the out-of-court statement bears adequate indicia of reliability--specifically, whether it falls within a "firmly rooted hearsay exception" or bears "particularized guarantees of trustworthiness." See Crawford, 541 U.S. at 68 (stating that "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framer's design to afford the States flexibility in their development of hearsay law--as does [Ohio v.] Roberts").

___ S.W.3d at ___; 2006 WL 120341, at *11. Thus, the admissibility of the nontestimonial hearsay of Dr. Melton is still subject to the standard set forth in Ohio v. Roberts.

In the present case, the testimony of Dr. Melton was clearly admissible under Tennessee Rule of Evidence 702, which provides:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

In fact, both counsel for the State and counsel for the appellant agreed that Dr. Melton was an expert in mitchondrial DNA testing. Rule 703 of the Tennessee Rules of Evidence contemplates three possible sources from which an expert may base his/her opinion: (1) information actually perceived by the expert; (2) information made known to the expert by others; and (3) information reasonably relied upon by experts in the particular field. See Tenn. R. Evid. 703; see also Neil P. Cohen, et. al., Tennessee Law of Evidence §§ 7.03(2), 7.03(3), 7.03(4) (3d ed. 1995).

In other words, Rule 703 contemplates that inherently reliable information is admissible to show the basis for an expert's opinion, even if the information would otherwise constitute inadmissible hearsay. See Tenn. R. Evid. 703. It is not uncommon for an expert witness's opinion to be based on facts or data that are not admissible into evidence, but are reliable. See Neil P. Cohen et al., Tennessee Law of Evidence § 7.03(4). In determining the reliability of the underlying information, that underlying data must be such that experts in that field reasonably rely on them in forming the same kinds of opinions or inferences that the expert in this case did. Id. Thus, Tennessee Rule of Evidence 703 provides that an expert may base an opinion upon clearly inadmissible hearsay, if the type of hearsay is one that would be reasonably relied upon by experts in that situation.

In the case before us, the laboratory technician's participation was limited to the mechanically objective preparatory procedure required for Dr. Melton's ultimate interpretation and analysis of the DNA sample. Dr. Melton checked the computations of the technician and verified during her testimony that the technician would have followed the standard laboratory procedures. See, e.g., Sherman, 62 F.3d at 142. Furthermore, Dr. Melton explained that the procedures for DNA testing are generally accepted within the scientific community as reliable. Further, she testified that she routinely supervised the tests performed by the laboratory technicians. Dr. Melton was justified in her reliance on the procedures performed by the laboratory technician. The laboratory reports contain the particularized guaranties of trustworthiness to keep them from violating a defendant's rights under the Confrontation Clause. Additionally, the defense was able to thoroughly cross-examine Dr. Melton as to the samples, procedures, safeguards and results reached in the present case. Thus, we conclude that Dr. Melton's testimony was properly admitted under Tennessee Rule of

Evidence 703,[3] which allows an expert to utilize inadmissible but reliable hearsay as a basis for their opinion, and the admission of her testimony did not violate the appellant's confrontation rights.

Prosecutorial Misconduct

Next, the appellant argues that the prosecutor's reference in her closing argument to the appellant's "alibi" was improper and prejudicial. Specifically, the appellant claims that the prosecutor intentionally misstated the evidence because the State's case was weak and that the prosecutor's further reference to the appellant's video-taped statement during closing argument exacerbated the harm and reflected the prosecutor's "plan or scheme" to confuse the jury. The appellant also contends that the curative instruction that the trial court gave at the time of the prosecutor's reference to an alibi was inadequate and that the court should have granted a further curative instruction in the final charge to the jury. The State disagrees, arguing that the immediate curative instruction given by the trial court "defused any harm" to the appellant.

In general, the scope of closing argument is subject to the trial court's discretion. Counsel for both the prosecution and the defense should be permitted wide latitude in arguing their cases to the jury. State v. Cauthern, 967 S.W.2d 726, 737 (Tenn. 1998). However, argument must be temperate, "predicated on evidence introduced during the trial," and relevant to the issues being tried. State v. Keen, 926 S.W.2d 727, 736 (Tenn. 1994). Thus, the State must not engage in argument designed to inflame the jurors and should restrict its comments to matters properly in evidence at trial. State v. Hall, 976 S.W.2d 121, 158 (Tenn.1998).

When a reviewing court finds improper argument, State v. Philpott, 882 S.W.2d 394 (Tenn. Crim. App. 1994), sets out five factors to determine whether a prosecutor's improper conduct could have affected the verdict to the "prejudice of the defendant." Id. at 408. The factors are: (1) the conduct complained of in light of the facts and circumstances of the case; (2) the curative measures undertaken; (3) the intent of the prosecutor in making the improper remarks; (4) the cumulative effect of the improper conduct and any other errors in the record; and, (5) the relative strength or weakness of the case. Id. (citing Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976)); see also State v. Goltz, 111 S.W.3d 1, 5 (Tenn. Crim. App. 2003).

[3] In Kennedy, we noted that many state and federal courts have admitted testimony similar or analogous to that admitted in the case sub judice under a Confrontation Clause challenge based upon the ground that the "business records" exception is such a firmly established and well-rooted exception that no violation of the Confrontation Clause would occur. 7 S.W.3d at 66 n.8. Notwithstanding the apparent acceptance of utilizing this hearsay exception, we expressed our reluctance to apply the business records exception to the testimony at issue in Kennedy. We express our continued reluctance in the present case for the same reasons - business records are ordinarily deemed reliable because they are prepared for other uses and are only incidentally prepared for purposes of litigation while the DNA analysis prepared in the present case was for no other purpose but this litigation, calling into question the report's reliability as a business record. See Id.

In the case herein, the following occurred during the prosecutor's closing argument:

> COUNSEL FOR STATE: Well, ladies and gentlemen, remember Ms. Summers who stated that the car looked crowded, that it looked crowded. Remember Ms. Fisher who said it looked like the driver was talking to someone in the car. And remember this, her alibi where she was, was that she was with her mother that day.
>
> COUNSEL FOR APPELLANT: Objection, your Honor.
>
> THE COURT: Sustained. There has been no proof in this case about an alibi. You are to remember the proof as you heard it. Stick to the proof.

From that point on, the prosecutor referred to the claims that the appellant made as to her whereabouts on the day of the crime in her "statement" to police. At the conclusion of the arguments, counsel for the appellant requested "some kind of instruction that there has not been any proof from defense of an alibi." The trial court disagreed, responding:

> Well, I said that. . . . They've been told that. I told them to disregard it [the reference to the alibi]. There was no proof of that [an alibi], so they are presumed to follow my instructions. And I think I began this session by saying that argument is not evidence, they should consider the evidence.

Looking to the five factors enunciated in Philpott, we first note that the State's case was rather strong against the appellant. Further, it appears that the prosecutor's reference to the alibi was more than likely inadvertent, given the prosecutor's immediate acquiescence to the trial court's admonition. The record does not reveal any other improper conduct by the prosecutor. Moreover, the trial court gave a curative instruction immediately on the heels of the objection. We conclude that the reference was not prejudicial and, therefore, harmless. This issue is without merit.

Sentencing

Finally, the appellant complains that the length of her effective sentence is excessive and that the record did not warrant consecutive sentencing. The State argues that the record supports the trial court's sentencing decision.

"When reviewing sentencing issues . . . , the appellate court shall conduct a de novo review on the record of such issues. Such review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting our review, we must consider the defendant's potential for rehabilitation, the trial and sentencing hearing evidence, the pre-sentence report, the sentencing

principles, sentencing alternative arguments, the nature and character of the offense, the enhancing and mitigating factors, and the defendant's statements. Tenn. Code Ann. §§ 40-35-103(5), & -210(b); Ashby, 823 S.W.2d at 169. We are to also recognize that the defendant bears "the burden of demonstrating that the sentence is improper." Ashby, 823 S.W.2d at 169.

Turning more specifically to the facts of this case, the defendant was convicted of criminally negligent homicide, a class E felony; and facilitation of attempted especially aggravated robbery, a class C felony. For class C and E felonies, the starting point for sentencing determinations is the minimum of the range. See Tenn. Code Ann. § 40-35-210(c). Undisputably, the appellant was a Range III persistent offender; thus, for criminally negligent homicide, four years was the minimum sentence against which the trial court was to balance any mitigating and enhancement factors. Tenn. Code Ann. § 40-35-112(c)(5). For the conviction for facilitation of attempted especially aggravated robbery, the minimum sentence is ten years. Tenn. Code Ann. § 40-35-112(c)(3).

In balancing these concerns, a trial court should start at the presumptive sentence, enhance the sentence within the range for existing enhancement factors, and then reduce the sentence within the range for existing mitigating factors. Tenn. Code Ann. § 40-35-210(e).[4] No particular weight for each factor is prescribed by the statute. See State v. Santiago, 914 S.W.2d 116, 125 (Tenn. Crim. App. 1995). The weight given to each factor is left to the discretion of the trial court as long as it comports with the sentencing principles and purposes of our code and as long as its findings are supported by the record. Id.

In the case herein, the trial court applied the enhancement factor (2) to both convictions, determining that the appellant had a history of prior convictions or criminal behavior in addition to those necessary to establish the appropriate range. Tenn. Code Ann. § 40-35-115(2).[5] Specifically, the trial court determined that the appellant's extensive criminal history warranted the maximum sentences of six years for criminally negligent homicide and fifteen years for facilitation of attempted especially aggravated robbery. The trial court declined to give weight to the proposed mitigating factor in which the appellant argued that she should receive mitigation because she did not go into

[4] We note that the Tennessee Supreme Court has determined that despite the ability of trial judges to set sentences above the presumptive sentence based on the finding of enhancement factors neither found by a jury or admitted by a defendant, Tennessee's sentencing structure does not violate the Sixth Amendment and does not conflict with the holdings of Blakely v. Washington, 542 U.S. 296 (2004), United States v. Booker, 543 U.S. 220 (2005), or United States v. FanFan, the case consolidated with Booker, because "the Reform Act [of Tennessee] authorizes a discretionary, non-mandatory sentencing procedure and requires trial judges to consider the principles of sentencing and to engage in a qualitative analysis of enhancement and mitigating factors . . . all of which serve to guide trial judges in exercising their discretion to select an appropriate sentence within the range set by the Legislature." State v. Gomez, 163 S.W.3d 632, 661 (Tenn. 2005). Effective July 1, 2005, the Tennessee General Assembly amended the sentencing act to reflect the advisory nature of enhancement factors.

[5] Since the appellant's sentencing hearing, Tennessee Code Annotated section 40-35-115 has been amended and the enhancement factors have been renumbered. In order to maintain clarity, we have referred to the enhancement factors by their number at the time of the appellant's sentencing hearing.

the antique store during the crime. In enhancing the sentence, the trial court noted that in addition to the convictions necessary to establish the appellant as a Range III persistent offender, the appellant also had at least five convictions for shoplifting, a conviction for prostitution, a conviction for criminal trespass, a conviction for simple possession, and a conviction for driving on a revoked license. We determine that the evidence does not preponderate against the sentencing determinations made by the trial court as to the length of the sentences. The trial court properly complied with the sentencing act, starting at the minimum sentence, enhancing the sentence as appropriate and considering, although not applying, as a mitigating factor the appellant's absence at the actual crime scene. This issue is without merit.

Consecutive Sentencing

Under Tennessee Code Annotated section 40-35-115(a), if a defendant is convicted of more than one (1) offense, the trial court shall order the sentences to run either consecutively or concurrently. The trial court may order the sentences to run consecutively if the trial court finds by a preponderance of the evidence that certain criteria enumerated in Tennessee Code Annotated section 40-35-115(b) are present. One of the provisions allowing consecutive sentencing provide that consecutive sentencing is warranted if: "The defendant is an offender whose record of criminal activity is extensive." Tenn. Code Ann. § 40-35-115(b)(2). Further, "consecutive sentences cannot be imposed unless the terms reasonably relate to the severity of the offenses committed and are necessary in order to protect the public from further serious criminal conduct by the defendant." State v. Wilkerson, 905 S.W.2d 933, 938 (Tenn. 1995). The decision to impose concurrent or consecutive sentences, however, is a matter entrusted to the sound discretion of the trial court. State v. Blouvet, 965 S.W.2d 489, 495 (Tenn. Crim. App. 1997).

In the case herein the trial court determined that consecutive sentencing was warranted because the appellant's record of criminal activity was extensive. Specifically, the trial court commented:

> I'm going to find that she clearly is an offender whose record of criminal activity is extensive. She has an incredible - - there is hardly a year, except when she is incarcerated, that she has not been involved in crime.
>
> Now given most of her crimes are theft-type nature, and she doesn't have the violent history in her past as evidenced by her prior convictions, she still has a record of criminal activity, which is extensive and she was on probation at the time this offense was committed, so given that, I'm going to run the sentences consecutive to each other . . . .
>
> I'm also going to look at Wilkerson because I think that is instructive and that the aggregate term reasonably relates to the severity of the offenses. This is an individual who was killed minding his own business and I find given her history, it is necessary

> to protect the public from further serious criminal conduct by the defendant, such that she needs to be incarcerated for the maximum period of time, so that is my decision.

We conclude that the trial court did not abuse its discretion in ordering consecutive sentences. The trial court considered the applicable sentencing guidelines, and the record supports the trial court's decision. The appellant had numerous prior convictions and admitted her extensive history of criminal behavior. This issue is without merit.

Conclusion

For the foregoing reasons, the judgment of the trial court is affirmed.

_____

JERRY L. SMITH, JUDGE